APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People, Plaintiff and Respondent, v. Kenneth Reynolds Wheaton, Defendant and Appellant, 2d Crim. No. 9915.

Filed: July 30, 1965.

Appeals from judgments of the Superior Court of Los Angeles County. James G. Whyte, Judge. Judgments of conviction affirmed.

Weaver, Radzik, Elias & Stricklen for Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and C. Anthony Collins, Deputy Attorney General for Respondent.

In each of the first two counts of an amended information the defendant was accused of the crime of forgery. (Pen. Code § 470.) In each of the other two counts he was charged with the crime of violation of section 475 of the Penal Code.[1] The jury returned a ver-

[1]Section 475 of the Penal Code is as follows: "Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, for the payment of money or property, with the intention to pass the same, or to permit, cause or procure the same to be uttered or passed, with the intention to defraud any person, knowing the same to be forged or counterfeited, or has or keeps in his possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, or any blank or unfinished check, money order, or traveler's check, made in the form or similitude of any check, money order, or traveler's check, whether the parties thereto are real or fictitious, with intention to fill up and complete such blank and unfinished note or bill, check, money order, or traveler's

dict of guilty with respect to each count. The defendant's motion for a new trial was denied and, as to the each of the first two counts, he was sentenced to be punished by imprisonment in the state prison for the term prescribed by law. No sentence was pronounced as to the third and fourth counts because the trial court believed that punishment could not be separately imposed with respect to those counts. (See Pen. Code, § 654; *People v. McFarland,* 58 Cal. 2d 748, 760-763.) The defendant has appealed from the judgment.

Portions of the record pertinent to the contentions to be considered will be noted.

David Greeley testified that in April, 1963, he was employed as a liquor clerk by Ralphs Grocery Company at 260 South La Brea Avenue in Los Angeles. On or about April 23, 1963, a writing which appeared to be a Food Giant money order bearing that date (Exhibit 1) was presented to him. In exchange for it he gave cash, cigarettes and liquor. He was "not positive" that the defendant was the man who handed the money order to him.

Robert James Zirretta testified that in April, 1963, he was employed by Ralphs Grocery Company as an assistant manager at 7257 Sunset Boulevard in Los Angeles. On or about April 23, 1963, a writing which appeared to be a Food Giant money order bearing that date and which was in the amount of $102.50 (Exhibit 2) was presented to him. He approved it and directed the man presenting it to take it to Bessie Carraro at

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check, or to permit, or cause, or procure the same to be filled up and completed in order to utter or pass the same; or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison for not less than one year or more than 14 years."

a check stand for the purpose of receiving cash for it. He could not "positively say yes or no" that it was the defendant who sought to have the money order approved.

Bessie Carraro testified that in exchange for the money order she gave cash to a man, but she could not remember whether that person was the defendant.

Donald H. Gasink testified that he was the chief special agent for the Bank of Pico Rivera. He related the procedure used by his bank in placing orders with the Burroughs Corporation, Todd Division, for the printing of money orders in the form of those involved in this case. He also testified as to the deficiencies appearing on the face of the two money orders which showed that they were not genuine. They had not been received by the bank from the printing company for distribution. When the two money orders came to his attention, he directed that each be returned to the bank from which it had been received by the Bank of Pico Rivera.

Louis Paul Matter testified that he was the quality control manager at the Burroughs Corporation printing plant in the City of Industry. After looking at the two money orders, he testified as follows: "They are money orders from a specific group of money orders that we produce for the Bank of Pico Rivera." But, he further said, they had not gone through the complete process of preparation at the Burrough Company's plant. Part of his testimony was: "Q. Do you know of your own knowledge what happened to the particular run of money orders for the Food Giant market of which People's 1 and 2 were a part? . . . [A.] There were a total of 15 rolls of paper which were taken from the back end of the press and put into tubes to be taken away and de-

stroyed because the magnetic and coding on them would not have been up to specifications, and to collate the forms would have been a useless operation." The waste material from the run of which Exhibits 1 and 2 were a part was packed up by Western Paper Mills Supplies, Inc., on April 16, 1963. With respect to the condition of the particular material so taken from the Burroughs Corporation on that date, the witness testified: "This is the first instance where we have had to take entire rolls from the press and destroy them. And prior to and during the time this order was processed we did not have the procedure of running rolls of paper through the band saw, so at this time when these were processed these could have been taken back and merely dumped in the baler instead of run through a saw, and our shredder would not shred these large rolls of paper."[2]

Ellsworth M. Hazzard testified that he was the personnel superintendent for the U. S. Gypsum Company in South Gate. The defendant Wheaton was employed by that company, the last period of employment being from September 27, 1962, to January 30, 1963. He was then a hydrapulper supplyman. His duties included the cutting of the wire around baled paper and the placing of the materials on a large conveyor by hand. The bales were stored on an unenclosed dock. There was no door between the dock and the room where the conveyor was located. The plant was enclosed by a steel fence approximately six feet high, with barbed wire extending about a foot above that. Mr. Hazzard testified that after approximately 4:30 p.m. ordinarily no one was present at

[2]Thereafter the court instructed the jury "to disregard any testimony about a course of practice involving either the cutting of the material by either a band saw or a shredding process."

the dock. The employees started work there in the morning at "7 or 8 o'clock, five days a week."

Henry McKay was called as a witness for the People. He was in custody, having pleaded guilty to a charge in another case. Before that, for approximately two years he lived with his wife, Janet McKay, at 143 East El Segundo in Los Angeles until about May 27, 1963. He had known the defendant since approximately January of 1963 as "a combination of casual acquaintance, friend and business associate." With reference to the money ordes (Exhibits 1 and 2), the witness testified in part as follows: "I obtained the checks approximately 10 days prior to my arrest for the crime that was involved here, and the date is rather fuzzy to me . . .— I believe it was some time in May.[3] I mean this I can't exactly state for sure. I can just remember the incident. . . . I was out riding around with a couple other men and I came home and the defendant and another man and my wife—. . . . The defendant and my wife an a friend of mine, Virgil Copeland, Renee Cook, my

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[3]On cross-examination the witness testified in part as follows: "Q. What was the date that Kenny Wheaton allegedly brought these money orders and checks over to your house? A. It was approximately 10 days prior to my arrest. I remember that because I was arrested on a Saturday and he brought them over on a Wednesday or a Tuesday—Wednesday morning, early Wednesday morning I believe it was. Q. And you were arrested approximately May the 27th? A. May the 27th, April the 27th I don't know. One of those days. I was arrested several times last year. Q. Was it your testimony on direct that you were arrested on May the 27th? A. I was arrested—I was arrested twice on this. Q. Was it your testimony that— A. I mean yes, it was in my testimony but like I said, I have quite a bit of trouble with dates and things like that. Q. Did I understand you to say that it was about mid-May when Kenny allegedly brought those to your house? A. That's what I said, but in looking at this, it was in mid-April. I mean, that's about as close as I can come to it."

children, were present at the house when I came home, and I was talking some business with these men that I was with, and as the business was terminating I was walking out of the house when Mr. Wheaton, the defendant, called me back into the house to show me something. . . . I followed him back into the house. I followed him into the kitchen and he produced the money orders. . . . I saw him go to the closet, he had his back towards me and took the money orders from the closet and put them on the table. . . . There was quite a few of them. I imagine I gathered up quite a bunch of them in my hand, see what they were, and I looked at them, made some comments on them."

The witness McKay further testified: "I mentioned that I would sell them for $10 apiece and that I would give him $3 apiece for them. . . . [H]e just told me that just go ahead and do it any way I wanted to, and he knew I'd take care of him on it." The witness said that part of the discussion took place in the bedroom where they went for privacy. His wife also went into the bedroom after he and the defendant had entered that room; then she "went back out."

As to the appearance of the paper which he saw on the kitchen table, the witness stated: "Well, there wasn't any individual money orders at that time, it was in groups. . . . Well, there was approximately 20 sheets with 12 useable money orders on them. There was approximately 35 or 40 sheets with six useable money orders on them, and then there was quite a bit of loose rough-cut sheets that had oh, maybe three or four money orders on them." When the witness went into the bedroom for the further discussion, he took the money orders with him.

Another portion of the witness McKay's testimony was: "A. Oh yes, we agreed not to have anybody in immediate contact with the paper to pass them, like myself, himself, my wife, Renee Cook, Virgil Copeland. Q. And whose idea was it to specifically exclude those people from passing them, any of this paper? A. It was mine. Q. And what did the defendant say, if anything, to that? A. He agreed."

The witness McKay also testified that the defendant told him where he got the paper; he said that he went over the fence and "went scrounging through there" to see what he could find, but he did not mention the name of the company. About a month prior to that time, the witness saw the defendant go over the fence at the premises of the U. S. Gypsum Company when they went there for the purpose of getting some payroll checks, but on that occasion no paper of the "right type" was found. His first discussion with the defendant about obtaining paper from the U. S. Gypsum Company "was back in February."

The witness McKay further testified that he placed the amount on each of the two money orders (Exhibits 1 and 2) with a check protector which he identified as being one shown him in court (Exhibit 6). He had directed the officers to the place where the check protector was found. Along with the money order marked Exhibit 1, he sold cards for identification. The purchaser was Walter Kelly and the sale occurred two or three days after the witness obtained "the paper." The other money order (Exhibit 2) "went at the same time." He sold approximately 25 money orders to Kelly.

Henry McKay testified that he would not allow his wife to participate in any way with respect to the matter of the money orders.

Fountain Virgil Copeland, a witness on behalf of the People, testified that he knew Mr. and Mrs. Henry McKay and remembered a visit to their home about April 23, 1963. The defendant came there about 2 a.m. and Mr. McKay came home approximately one and half or two hours later. When the defendant arrived he took a roll of paper from underneath his shirt and placed it on the kitchen table. The witness Copeland further testified: "And I looked at it and I seen it was some kind of checks or something. I was scared, I threw it in the closet. . . . All I could tell was that they were some kind of money orders." And to the conversation in the kitchen after Henry McKay came home, the witness said: "Well, there was conversation going on but I didn't want nothing to do with it and I didn't pay much attention to it." He went into the living room. On cross-examination he testified that he did not participate in the discussion as to the way to distribute the money orders, but he was in the room. He was "not positive" that the money orders which were in the courtroom were among those that he saw at the McKay home.

Mr. Copeland also testified that the check protector and the money orders contained in a suitcase were picked up by the police at a motel where he and Henry McKay were registered, but he had not known that those items were there.

Janet McKay, called as a witness on behalf of the People, testified that she was the wife of Henry McKay. About the middle of April, 1963, she saw the defendant at her home when she returned shortly after midnight. Several hours later she saw a "series of checks." Part of her testimony was: ". ... I was in the kitchen cooking and everybody else was kind of gathered

around, you know, in the kitchen, and all of a sudden the checks appeared." The defendant removed them from the broom closet in the kitchen and said, "Hey, Hank, look what I got for you." She further testified that she "got a little upset about it at the time" because she did not want anything at her house that was stolen. She asked the defendant why he brought "them" there. She described the papers as follows: "They were in long strips and folded over double. Perhaps they were maybe four, four feet long. Could be that long, folded over double." The papers were taken into the bedroom and she was in and out of there; her husband told her to get out. The next day he saw the check protector in the kitchen. Several days later her husband called her and told her to put the papers in a suitcase and he would pick them up. She did so, and that was the last time she saw them "until recently."

Mrs. McKay further testified that she saw a check protector which her husband had in the kitchen. She never saw him use it, "[n]ot on these checks anyway." The check protector marked as Exhibit 6 appeared to her to be the one that she saw on the kitchen table the next day after she first observed the checks or money orders. When she put them in the suit case they had been cut. She testified in part as follows: "Q. Were you instructed to dispose of them yourself, or do anything with them? A. No. The scraps I was, but that's all." She heard discussion between her husband and the defendant about the money orders on the first night, a portion of her testimony being as follows: "Well, Hank was real excited about them. In fact, everybody was. . . . And he said that, well, Kenny said that he'd try to get him more, that these weren't very good. And Hank said

they were just fine, you know, he could do just fine with them and then as he was leaving Hank called wait a minute and said that if they'd figure out financial arrangements later, and Kenny said okay, he wasn't worried about that right then." She further testified that "they was always talking about them when they were together when I was around for the next few days." Approximately a week later she saw her husband give the defendant money; her husband told the defendant that when more money came in from the money orders the defendant would get "his."

On cross-examination Mrs. McKay said that her husband cut the money orders by himself, using a paper cutter, but a man named Kelly was there. She disposed of the scraps of paper by throwing them in the trash"; she did not burn them.

Albert Chavez was called as a witness by the People. He was receiving supervisor for the U. S. Gypsum Company. He testified as to the receipt of a bale of paper from the Burroughs Company on April 17, 1963.

Renee Cook testified that she lived at the McKay home from approximately Thanksgiving day of 1962 to about the end of April of 1963. She took care of the McKay children. About April 23, 1963, the defendant came to the house about 2:30 or 3:00 a.m. Later Mr. McKay returned home. She saw nothing unusual on the kitchen table and heard no discussion between the defendant and Mr. McKay about any checks or money orders. She also testified that she did see the two money orders on the kitchen table (Exhibits 1 and 2), along with others which were "scattered on the table." She further testified: "They were in a strip and then they had cut them up cutting them up. . . . The following

day that they cut them up." She did not recall what man had taken them out of the closet in the kitchen. She also testified as follows: "And then they were making the amount of moneys on the checks and then they got rid of all. They put it all in suitcase and then they just took off. . . . Danny and it was Virgil and Hank took them away from the house."

William L. Bowman testified that he was an examiner of questioned documents for the Los Angeles County Sheriff's Department. He expressed the opinion that the check protector in evidence (Exhibit 6) had been used to make the impressions on the two money orders (Exhibits 1 and 2).

Thereafter the defendant offered witnesses who mainly testified as to impeaching statements or conduct, the making or occurrence of which had been denied by witnesses for the prosecution in the course of cross-examination.

The first witness called on behalf of the defendant was Dean Tulley. He testified that in the latter part of June and the first part of July of 1963, the defendant was residing at Janet McKay's house. On one occasion at about 3 o'clock in the afternoon the defendant and Mrs. McKay were in bed together in the bedroom. He believed that he heard that Mr. McKay was in jail.

Mary Jane Wood was called as a witness on behalf of the defendant. Mrs. McKay phoned her in the latter part of June or early in July of 1963 and said that she was in love with the defendan tand was going to tell her husband that she wanted a divorce. In June the defendant gave Mrs. McKay's phone number to the witness as the phone number by which he could be reached.

Ruth Kykendall, the defendant's grandmother, testified on his behalf. In the first part of June, 1963, the defendant and Janet McKay came to her home in Hemet for the day. Mrs. McKay said that she had been to see her husband at the jail and had said to him that she was going to get a divorce and hoped that she could marry the defendant. She further said that Mr. McKay told her that he would beat her up if she did. In the latter part of July Mrs. McKay came to Hemet with her husband. Mrs. McKay said, "Hank has made a deal with the cops that if they will let him out he will put the finger on some person." She also said that that person was the defendant.

Harold Fulkman, who was 16 years old, testified that he was the defendant's cousin. On the last Sunday in July of 1963, they went hunting in the vicinity of Hemet. Mr. McKay came to the house of the witness' grandfather. He heard Mr. McKay say to his grandfather, "If I can not get him here, then I will get him into Chino and will get him there."

Joseph L. Kykendall testified on behalf of the defendant. On the last Sunday in July of 1963, he had a conversation with Hank McKay near Hemet. Mr. McKay said, "Kenny Wheaton is going to do what he is told or I will get my boys to make him march." He also said, "Kenny ran with Jan while I was in jail and I will burn him."

In rebuttal the prosecution recalled Janet McKay as a witness. In substance she denied that there had ever been any occasion upon which she was in bed when Dean Tulley came to her house at approximately 3 o'clock in the afternoon. She denied that she told Mary Jane Wood that she was going to leave her husband and

marry the defendant. Her husband was in jail in the latter part of June and the early part of July. At that time she was receiving state aid.

John E. Evans, Jr., a deputy sheriff for the County of Los Angeles, was called as a witness in rebuttal. He made no promises of any kind to Henry McKay. Mr. McKay, when asked, freely and voluntarily revealed the source of his supply of money orders.

The defendant did not testify as a witness in his own behalf.

"The crime of forgery consists either in the false-making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud (Sec. 470, Pen. Code.)" (*People v. McKenna,* 11 Cal. 2d 327, 332.) In each of the last two counts of the information, the alleged violation of section 475 of the Penal Code was that the defendant "did willfully, unlawfully, feloniously and knowingly have in his possession a blank and unfinished money order made in the form and similitude of a money order with the intent to fill up and complete such blank and unfinished money order and to utter and pass the same, and to permit, cause, and procure the same to be uttered and passed, with intent to defraud" named persons.

The first contention made by the defendant is that the evidence was insufficient to sustain the conviction in that there was no evidence to corroborate the "accomplice testimony" which "connected appellant to the offense charged." After having given the instructor set forth in the footnote,[4] the trial court instructed the

[4]"A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

jury as follows: "If any crime, the commission of which is alleged in the information, was committed by anyone, then, under the evidence in this case and as a matter of law, the witness Hank McKay was an accomplice. Whether any other person was or other persons were accomplices is for you to determine from the evidence introduced."

The question thus presented is whether the jury could properly find that the witnesses Janet McKay and Virgil Copeland, or either of them, did not fall into the category of an accomplice and, if so, whether their testimony, or that of either of them found not to be an accomplice, was sufficient to constitute the requisite corroboration of the testimony of the witness Henry McKay.

As succinctly stated in *People v. Franklin,* 194 Cal. App. 2d 33, at page 31: "The key to the role of an accomplice in participation in a crime lies in his volitional common intent to unite with the principal offender in its perpetration. The cases have defined an accomplice as one who 'must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime.' [Citations.]" The jury was warranted in finding that neither Mrs. McKay nor Virgil Copeland with common intent united with the de-

"An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the testimony and the circumstances as shown by the evidence. There is an exception to this which will be covered by a later instruction.

"To render a person an accomplice, he or she must in some manner knowingly and with criminal intent aid and abet or assist or participate in the criminal act. If you should find that any witness in this case so conducted himself in respect to any crime charged, you must find that he was an accomplice as to that crime."

fendant in the commission of a crime within the meaning of the quoted definition. It is true that Mrs. McKay disposed of the scraps of paper resulting from her husband's labor in preparing the money order forms for fraudulent use and that she carried out his directions in putting the prepared forms in a suitcase to be taken from her home, but such conduct did not compel the inference that she, with the requisite intent, was acting in concert with her husband and the defendant in furtherance of their criminal purpose. (See *People v. McCleary,* 205 Cal. App. 2d 432, 435-436.)

With respect to the subject of what constitutes the requisite corroboration, the Supreme Court stated in *People v. Lyons,* 50 Cal. 2d 245, at page 257: "The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." In *People v. Wade,* 53 Cal. 2d 322, the court said at page 329: "The corroborative evidence may be slight and entitled to little consideration when standing alone."

The accomplice Henry McKay testified that he and the defendant agreed that the money orders would not be passed by anyone closely connected with them but that they would be sold. The only purpose of such a sale would be, of course, to enable the purchaser to pass

the forged money orders as genuine. McKay further testified to his completion of the money order forms so that they could be so used and as to the sale thereof to Kelly. The testimony of Virgil Copeland corroborated that of McKay as to the presence of the uncompleted forms in the possession of the defendant at the McKay home. The testimony of Mrs. McKay, however, was of more significance. She testified that she observed the uncompleted forms in her home, as well as the presence of a check protector. She heard her husband and McKay discuss the money orders and the financial arrangements with respect to them. She testified that her husband cut the paper into individual forms and that the money orders were in that condition when they were removed from the house. Her testimony clearly supported the testimony of her husband to the effect that he and the defendant had in their possession unfinished money orders for the purpose of completing them so that they could be uttered or passed as genuine. Her testimony also lent substantial support to that of her husband as to the completion of the forged forms for such use.

If Mrs. McKay was not an accomplice, her testimony satisfied the test stated in *People v. Lyons, supra,* 50 Cal. 2d 245, 257, as to the sufficiency of corroborative evidence. Since the evidence was sufficient to sustain a finding that she was not an accomplice, and since the question of whether she occupied that position was left to the jury under proper instructions, it must be presumed in support of the judgment that the jury found that she was not an accomplice. (*People v. Rosoto,* 58 Cal. 2d 304, 329.)

The second contention of the defendant relates to the giving of an instruction on the subject of the failure of

the defendant to take the witness stand of the nature of that which was condemned in *Griffin v. California,* .... U.S. ....,* and to the comment of the prosecutor as to such failure in the course of his opening argument to the jury. The statement of the prosecution was: "However, the People believe there is sufficient other evidence to help support the theory of its case, of our case. First off, it is to be noted that the defendant has not taken the stand to explain or otherwise affirmatively present any evidence in this case. This is certainly within his right, no person under the Federal or State Constitution may be compelled to testify, and that fact alone would certainly not be any basis for your finding him guilty. Nevertheless, it is the law, and the court will so instruct you at the conclusion, that you may consider this along with all the other evidence in the case in evaluating it. If you feel that the state of the evidence has reached the point where the defendant could explain or it would be reasonable for him to explain, or to deny certain allegations, then you may take his failure to testify as one of those factors which you may consider in arriving at your verdict."

The effect of the error must be determined in the light of article VI, section 4½, of the California Constitution. (*People v. Bostick,* 62 Cal. 2d ...., ...** After a review of the entire record, however, we have concluded that in the absence of the challenged instruction and the comment of the prosecutor it is not reasonably probable that the jury would have reached a verdict more favorable to the defendant. There has been no miscarriage of justice because of the error.

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*Filed April 28, 1965.

**Advance Report Citation: 62 A. C. 869, 872.

The final contention of the defendant is that it was error for the prosecutor in his opening statement to say: "We will also show that because defendant was observed climbing over the fence and leaving his place of employment at the U. S. Gypsum Company on a number of occasions, he was fired from his employment." No objection was made to the statement.

It is, of course, obvious that the existence of such a reason for the termination of the defendant's employment was not relevant in the present case except inso far as it might bear on his ability to climb over the fence to obtain paper of the nature of that involved in this case. It is to be noted, however, that shortly before the statement was made the court admonished the jury that an opening statement was not evidence and was not to be considered by the jury as such. Moreover, there is nothing in the record to indicate that the prosecutor was not acting in good faith. Before the case was submitted to it, the jury was instructed that, except as to factual stipulations, any statement made by counsel in the jury's presence concerning the facts in the case must not be regarded as evidence.

As stated in *People v. Grandos,* 49 Cal. 2d 490, at page 495: "[O]pening statements are supposed to be an outline of what the People intended to prove, and failure to do so, whether on account of rules of evidence or otherwise, does not necessarily indicate prejudice." (See also *People v. Lucas,* 160 Cal. App. 2d 305, 308.) The lack of prejudice in the present case is evident upon a review of the entire record. We are not free to declare that there has been a miscarriage of justice because it is not reasonably probable that a result more favorable to the defendant would have been reached in the absence

of the challenged statement. (See *People v. Watson,* 46 Cal. 2d 818, 834-837.)

We have also considered the impact of the reasoning of *People v. Dorado,* 62 Cal. 2d ....,* upon certain testimony given by the witness Henry McKay. Part of his direct examination was as follows: "Q. Was the defendant present at any time when the officers were interrogating you with regard to this paper? A. Yes. Q. Where was he with relation to where you were? A. He was in custody at the Hall of Justice. Q. No, I mean were you in the same room together or were—A. Yes. Q. And were you standing up or sitting down or where? A. We were seated. Q. And where was the defendant seated with relation to where you were seated? A. Kind of catty-corner from across the table from him. Q. Was there anything separating you two? . . . The Witness: No. Miss Friedenberg [deputy district attorney]: Q. How long was the interrogation period? A. About 30 minutes I guess. Q. And during the interrogation did you make statements implicting the defendant? A. Yes. Q. And what did the defendant say or do, if anything, when you made these statements? A. Nothing. Q. Were you present at any time when he was interrogated? A. No. Q. Do you recall whether or not during your own interrogation the defendant was asked any questions? A. Yes. Q. Do you recall what he was asked, and the answer he gave? A. Not exactly."

On cross-examination the witness McKay testified in part as follows: "Q. This interrogation of you, Mr. McKay, was actually done by Sergeant Poggione and Sergeant Evans, who is sitting here at the counsel table, is that correct, sir? A. Yes. Q. And do you remember

*Advance Report Citation: 62 A. C. 350.

that when Mr. Wheaton was asked to comment on what you had said that Mr. Wheaton reminded the officers that he was told by Mr. Radzik, . . . he is an attorney, by Mr. Radzik, not to discuss the case without one of the attorneys being present? Miss Friedenberg: I object to the form of the question, I think it is ambiguous and compound and a portion of it contains a conclusionary statement of counsel. The Court: Reframe the question, Counsel. Mr. Weaver [defendant's attorney]: I'm sorry. Q. When Mr. Weaton was asked to comment on the questions presented to you and the answers that you had given, then Mr. Wheaton reminded the officers that he, Mr. Wheaton, was told not to discuss the case without his attorney being present? Miss Friedenberg: Well, I'd object as assuming a fact not in evidence. The Court: Overruled. The Witness: I don't remember anything like that."

The witness did not testify as to any specific statement made by him or by the defendant to the police officers. He said that he made "statements implicating the defendant" and that the defendant remained silent, but the content of his "implicating" statement was not disclosed. Obviously no confession by the defendant was involved. At most, only a very indefinite inference of an implied admission on the part of the defendant could reasonably be drawn from Henry McKay's testimony. It is not reasonably probable that there would have been a result more favorable to the defendant Wheaton if the quoted testimony of Henry McKay had been excluded. Consequently, there can be no valid claim of prejudice under the *Dorado* rule. (See *People v. Hillery*, 62 Cal. 2d , .*)

*Advance Report Citation: 62 A. C. 726, 746-747.

A consideration of the whole record leads to the conclusion that the defendant rceived a fair trial and that the verdicts of the jury were amply sustained by the evidence.

In a prior case (Superior Court No. 254047) the defendant was found guilty of the crime of violation of section 10851 of the Vehicle Code. The proceedings were suspended without imposition of sentence and he was placed on probation for a period of three years. Because of his conviction of the charges as to the money orders discussed hereinabove, probation was revoked and, at the time of imposition of sentence for the latter charges, he was sentenced to be punished by imprisonment in the state prison for the term prescribed by law for the offense of violation of section 10851 of the Vehicle Code, the sentences in the two cases to run concurrently. He has also appealed from that judgment but, in the absence of a basis for the reversal of the judgment in the later case relating to money orders, the judgment imposed upon the revocation of probation must stand.

The judgments in both cases (Superior Court No. 254047 and No. 277560) are affirmed.

Ford, *J.*

We concur:

Shinn, *P. J.*

McMurray, *J. pro tempore.***

**Assigned by Chairman of Judicial Council.